IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an Appeal against the order of the High Court under Section 331 of the Code of Criminal Procedure Act No. 15 of 1979 of the Democratic Socialist Republic of Sri Lanka.

The Democratic Socialist Republic of Sri Lanka

COMPLAINANT

Court of Appeal Case

No.CA/HCC/43/2020

High Court of Colombo

Case No. HC 10/2019

Vs.

Rajapaksha Manikkuge Hasantha De Silva

ACCUSED

AND NOW BETWEEN

Rajapaksha Manikkuge Hasantha De Silva

ACCUSED-APPELLANT

Vs.

Hon. Attorney General,
Attorney General's Department
Colombo 12.

COMPLAINANT-RESPONDENT

Before: **Amal Ranaraja J**.

&

Dr. Sumudu Premachandra J.

Counsel: Kaneel Maddumage for the Accused-Appellant.

Suharshie Herath, D.S.G. for the State.

Accused-Appellant is on Bail.

Written Submissions: By the Accused-Appellant filed on 16/12/2021.
By the Respondent filed on 01/06/2022.

Argument On : 16/06/2026.

Judgement On : 31/07/2026.

Dr. Sumudu Premachandra J.

1] The Accused Appellant was charged for the following offences in the High Court of Colombo;

- **Count 01:-** Committing the offence of cheating and thereby dishonestly inducing one Dilip Janaranjan Weerasinghe in a fraudulent manner on or about 19/01/2013 in Colombo who was deceived upon the promise to settle the payment at a future date by delivering gemstones worth of Rs. 7,000,000/- punishable under Section 403 of the Penal Code as amended.

- **Count 02:-** The said Accused consequent to the above transaction in Count 01, handed over a cheque bearing No. 013760 on 28/04/2013 drawn to pay a sum of Rs. 7,000,000/- with the knowledge that account bearing No. 0801010006798 of Hatton National Bank having no money to pay the same, which the Accused having knowledge that it will be dishonored due to the lack of funds is guilty of an offence punishable under Section 25 of the Debt Recovery Act No. 02 of 1990 amended by Act No. 09 of 1994. However, the second count was withdrawn on 14/10/2019.

2] On 29/05/2020, the Learned High Court Judge delivered the judgement convicting the Appellant for the 1st count. Thereafter, the Learned High Court Judge imposed the following sentence;

- A sentence of 05 years' rigorous imprisonment.

- Fine of Rs. 200,000/- in default of imprisonment for 01 year.

- Compensation of Rs. 7,000,000/- to be paid to the Complainant- P.W. 01 in default of rigorous imprisonment for 18 months.

- Ordered the default sentences of the fine and the compensation to run separately after the sentence.

3] Being Aggrieved to the said judgement and the sentence the Appellant preferred this Appeal on the grounds of;

a) The Prosecution has failed to prove the charge of cheating beyond reasonable doubt.
b) The Learned High Court Judge has erred by allowing the Prosecution to maintain the 2nd charge while allowing the withdrawal of the 1st charge.
c) The Learned High Court Judge has failed to consider that P.W.01 and P.W.03 are no credible witnesses and therefore,

it was unsafe to convict the Accused-Appellant based on their evidence.

d) The Appellant has been denied the Right to a Fair Trial.

e) The Prosecution has failed to establish a strong case against the Appellant as material witnesses have not been called to give evidence.

f) The Learned High Court Judge has failed to consider the authenticity of the document marked P 01.

g) There is a doubt as to whether the alleged transaction had taken place in Sri Lanka as alleged by the Prosecution.

h) The Sentence imposed on the Appellant is excessive.

4] P.W. 01 is a gem seller by profession and he is carrying out his business in Sri Lanka and China since 1994. P.W. 01 and the Appellant met in China in 2011 and they were engaged in Gem Business and carried out business without dispute till 2013. P.W. 01 sold gems through the Appellant during the above period and P.W. 01 trusted the Appellant. On 13/01/2013, at the World Trade Centre, Colombo P.W. 01 gave Gemstones referred in P1(පැ1) document, value of Rs. 7,016,100/=. The evidence shows that the Appellant failed to pay the said money or returned the Gemstones. Till April 2013. Thereafter , the Appellant gave a cheque to the value of sum of Rs. 7,000,000/= which was later dishonoured. On 18/12/2013, P.W. 01 made a complaint to the CID. Consequently, the Appellant was arrested and produced before the Fort Magistrate and he was remanded. In the Magistrate's Court, the Appellant agreed to pay the said amount by Rs. 250,000/- monthly installments where he defaulted after paying one month and vanished for the next 5 years.

5] After calling the Prosecution witnesses, the Defense moved that P2 be sent to EQD and call a report, thereafter, the Prosecution withdrew the count 2 on 04/10/2019.

6] On behalf of the Defense, the Appellant made a dock statement and called another two witnesses. The Appellant's version was that the said Gem stock was not given to the Appellant in Sri Lanka, it was given to the Appellant in China and he had given them to a buyer in China to be sold. The P.W. 01 directly contacted the said buyer and there had been a verbal argument and P.W. 01 based on the said animosity lodged a complaint to CID and got a travel ban against the Appellant. According to Defense witnesses, the Appellant stated that the said Gem Stock in question was exported by the Appellant.

7] I now consider the merits of this Appeal. As grounds of appeal are interwoven, I shall consider them as a whole. The Prosecution claims that the Accused committed the offence of cheating under Section 403 of the Penal Code inducing the complainant, a gem exporter, to hand over Gemstones valued at approximately Rs. 7,000,000 on the representation that payment would be made later. The Prosecution relied on the testimonies of four witnesses, including the complainant (P.W. 01) and his employee (P.W. 03), together with key documentary evidence comprising the signed Gem transaction receipt (P1), the dishonoured cheque (P2), additional transaction documents (P3–P5), and bank records (P6 and P6A) confirming account activity, payments, and transfers.

8] It should be noted that the fundamental principles of criminal law, emphasize the presumption of innocence, the Prosecution's burden to establish guilt beyond a reasonable doubt, and the Accused's right to silence, which cannot be used to remedy deficiencies in the Prosecution's case. Most importantly, the Court stressed that liability under Section 403, read together with Sections 22 and 398 of the Penal Code, requires proof that the Accused possessed dishonest or fraudulent intention (*mens rea*) at the very moment the property was obtained, and that a mere failure to honour a promise or repay a debt does not amount to criminal cheating.

9] The section 398 of the Penal Code describes the offence of Cheating as follows;

> *"Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government, is said to 'cheat'."*

10] It is noteworthy to say, "dishonestly" is the most vital part, that is the "Mens Rea" of the Offence, which must be at the time of delivery of the good or act of omission. The section 22 of the Penal Code describes what is "dishonestly" as follows;

> *"22. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, is said to do that thing' dishonestly."*

11] The section 22 of the Penal Code makes it clear that the dishonest intention should be with the act itself. In the case of ***Kapila Nishshanka Kumarage v. Attorney General*** (SC Appeal No. 51/18, decided on 04/05/2021), His Lordship Yasantha Kodagoda, PC, J. detailed the offence of cheating as follows;

> *"From this definition, it is evident that the offence of 'cheating' can be committed in several ways. The focus here is not on the modus operandi that may be adopted by the perpetrator of the offence, but on technical ways recognized by the Penal Code, as amounting to 'cheating'. Those multiple ways in which the offence of 'cheating' may be committed, are as follows:*

1. By deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person.

2. By deceiving any person, fraudulently or dishonestly induces the person so deceived to consent that any person shall retain any property.

3. By deceiving any person, intentionally induces the person so deceived to do anything which he would not do if he were not so deceived, and which act causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government.

4. By deceiving any person, intentionally induces the person so deceived to omit to do anything which he would do if he were not so deceived, and which omission causes or is likely to cause damage or harm to that person in body, mind, reputation, or property, or damage or loss to the Government."

12] In that case his Lordship further elaborated the structure of charge of cheating as;

"From the structuring of the charge of 'cheating' preferred against the Appellant (i.e. the first charge on the charge sheet), it would be seen that the prosecution had premised the charge on the first out of the four ways in which I have described above, the offence of 'cheating' may be committed. Thus, it is necessary to consider whether, the prosecution has proven that the Appellant practiced deception in respect of the virtual complainant in the manner alleged in the charge. Whether he entertained a dishonest intention when he solicited a loan from the virtual complainant is of critical importance. Furthermore, it is necessary to consider whether through such deception, the Appellant had fraudulently or dishonestly induced the virtual complainant to deliver property to the Appellant. From the perspective of the virtual complainant, it is necessary to consider whether it was the alleged

act of deception (if any) practiced by the Appellant, which caused the virtual complainant to deliver property to the Appellant. Even if the alleged offender had practiced deception, and nonetheless quite independent of the deceptive assertion made by the offender, the alleged victim had due to some auxiliary reason departed with property, the offence of 'cheating' would not be made out. This is because, the prosecution under such circumstances has failed to establish a causal relationship between the deception practiced by the alleged offender and the conduct of the victim."

13] In ***Athputharaja Wijayarajan vs Attorney General***, COURT OF APPEAL CASE CASE No. CA 235/2011, Decided on: 22/11/2021, His Lordship N. Bandula Karunarathna J. stated;

"The definition of cheating in section 398, clearly fits into the facts of the case.

The component elements of the offence are as follows;

• the deception of any person by the accused;

• the carrying out of the deception fraudulently or dishonestly;

• through the deception, inducing the person deceived;

(i) to deliver any property to any person, or

(ii) to consent that any person shall retain any property, or

(iii) to do or omit to do anything which he would not otherwise do or omit;"

14] His Lordship, in that case, further noted;

"It is quite clear that on a charge of obtaining goods or money by false pretences, ***no conviction is possible unless it is shown that the mind of the prosecutor was misled by the false pretence and that he was thereby induced to part with this money or good.****"*

This concept is explained in P. S. A Pillai's Criminal Law (12th Edition at pages 814 to 819.) It is as follows:

'It is important to note that dishonest intention should be present at the time of making the promise. It is necessary to consider that for the offence of cheating to be made out, the inducement by the accused to the complainant must have been made in the initial or early part of the transaction itself. What is important is to prove that, at the time that the person induced was made to part with money, the accused person ought to have known that their representation was false and that the representation was made to deceive the other person. If this is not shown, then the dispute is only civil. The fact that after the transaction, the accused person did not honour their promises would only create civil liability, and criminal liability cannot be fastened on the accused." [Emphasis is added]

15] The learned D.S.G. has contended that the conduct of the Accused imposes strict liability on him. A strict liability offense in criminal law is a crime where the Prosecution does not need to prove a guilty mind or intent (*mens rea*). Guilt is established simply by proving that the prohibited physical act (*actus reus*) happened, commonly seen in traffic violations and regulatory health codes. However, cheating (fraud or deception) cannot be a strict liability offense because criminal cheating fundamentally requires proof of dishonest or fraudulent intent from the very beginning. Thus, the Prosecution must prove when the purported Gemstones were given by the P.W. 01 to the Accused Appellant, that the Accused had dishonest intention.

16] In ***<u>Nimal Pinsiri Vs Hon. Attorney General</u>***, Court of Appeal No. CA 77/2014 decided on 18/11/2019, His Lordship Justice Yasantha Kodagoda, PC President, Court of Appeal held that Prosecution is obliged to prove charge beyond reasonable doubt as follows;

"A criminal trial in Sri Lanka's system of administration of justice is an adversarial process in which both sides to the case, i.e. the prosecution and defence are entitled to present evidence in support of their respective cases. Unless the Accused pleads 'guilty to the charge, ***<u>the prosecution is obliged by law to present evidence and prove its case beyond</u>***

'reasonable doubt'. Unlike the prosecution, the defence is not obliged to present evidence. *However, the defence is entitled to present evidence. Either by impugning the evidence of the prosecution and / or by presenting defence evidence, the duty cast on the defence is to create a 'reasonable doubt' regarding the case for the prosecution. The overall scheme relating to the procedure to be followed in the conduct of criminal trials as contained in the Code of Criminal Procedure Act is in conformity with the rules of 'natural justice'. The rules of natural justice require the judge who is called upon to adjudicate, to do so, objectively, after hearing and considering the evidence presented on behalf of both the prosecution and the defence. Objective consideration of evidence requires the judge to take into consideration all relevant facts and disregard any irrelevant facts. In determining what facts would be relevant as opposed to irrelevant facts, the trial court will be guided by legal principles contained in the Law of Evidence, as opposed to concepts of logical relevance."* [Emphasis is added]

17] Thus, the conduct of the Accused would give strict liability that cannot be taken as a valid point to prove dishonesty at the time of exchanging Gem stocks. When I consider the evidence of P.W. 01, it is seen they were friends and had done Gem businesses before the incident. The evidence of P.W. 01 had established a Gem-trading relationship based on mutual trust since 2011, having successfully executed 6 to 7 prior high-value transactions. In accordance with customary Gem trade practices, P.W. 01 handed over the Gem stock (valued at Rs. 70 Lakhs detailed in document "P-01" on credit base on this pre-existing commercial trust, rather than any deceitful misrepresentation. Crucially, cross-examination of P.W. 01 reveals that when the Appellant issued the cheque, he explicitly informed P.W. 01 that there were insufficient funds in the account and that he would specify a later date for deposit; thus, P.W. 01 knowingly accepted the cheque purely as a security mechanism. Thus, the Prosecution failed to establish cheating beyond a reasonable doubt.

18] The learned DSC contended dishonest intent through objective bank records and the Appellant's conduct. P.W. 07, produced mandate papers and account statements showing an active overdraft that prevented third-party payments; when the Rs. 7,000,000/- cheque (drawn 28/04/2013) was presented on 13/05/2013, the account balance was only Rs. 87,787.07, causing immediate dishonor. Crucially, document P-6B showed that four other cheques drawn on the same account were dishonoured around the same time, demonstrating that the Appellant habitually issued cheques while fully aware of his account's lack of funds and credit. However, it is my considered view that when the 2nd Charge was withdrawn, the evidence relating to cheque bouncing cannot be taken to prove the 1st charge. It cannot be taken as evidence against the section 8(1) of the Evidence Ordinance, the subsequent conduct of the Accused as it was issued as a security and the P.W. 01 had admitted the said position.

19] In ***Athputharaja Wijayarajan vs Attorney General***, COURT OF APPEAL CASE Vs. CASE No. CA 235/2011, Decided on: 22/11/2021, His Lordship N. Bandula Karunarathna J. considered the commercial transaction cannot be treated as criminal and it is as follows;

> *"If the accused-appellant did not honour the payment secured by his cheques given as a guarantee to the complainant he could make use of them to file civil litigation in civil court to recover if any amount of money was due.* ***This transaction could be considered a civil transaction and therefore criminal liability cannot be imposed on the accused-appellant as the prosecution failed to prove the intention to cheat and thereby dishonestly induces the person deceived to deliver any property to the complainant.*** *Thus, I decided that the prosecution fails to prove beyond reasonable doubt that the accused appellant did deceive the complainant.*
>
> *Thus, I decided that the prosecution fails to prove beyond reasonable doubt that the accused appellant did deceive the complainant. In the circumstances, it is my view that the accused-appellant had not committed the offence of cheating as stated in counts 1,4 and 7 of the indictment."* [Emphasis is added]

20] It is seen the learned High Court Judge posed question to ascertain the business relationship of the P.W. 01 and the Accused. In assessing the evidence, I found that the complainant and the Accused had maintained an ongoing credit-based Gemstone trading relationship between 2011 and 2013, during which the Accused regularly received Gems, sold them, returned unsold stones, and made payments over time. Although the Prosecution relied heavily on the dishonored cheque (P2), the documentary trail, and bank records, the Court held that these documents primarily established an outstanding commercial liability rather than proving fraudulent intention at the inception of the transaction.

21] I am of the view that a civil transaction or simple breach of contract cannot be treated as a criminal offense of cheating without proof of dishonest intention at the very beginning, as courts heavily discourage turning civil disputes into criminal cases to avoid abusing the legal system. The deception or dishonest intent (*mens rea*) must exist from the exact start of the agreement, not develop later due to a business failure. Using police complaints or criminal prosecution merely as a fast tool for debt recovery or pressuring a party should be frown up and discouraged. Further, failing to keep a promise, repay a loan, or clear business dues signifies a civil contract default rather than penal fraud. The evidence of this case falls into the civil category rather than criminal.

22] Accordingly, I concluded that the Prosecution failed to prove beyond a reasonable doubt that the Accused possessed the requisite criminal *mens rea* when the Gemstones were initially entrusted to him. Reiterating the settled legal principle that a breach of contract, failure to pay a commercial debt, or the dishonor of a cheque does not by itself constitute criminal cheating, the Court characterized the dispute as one arising from a commercial transaction for which civil remedies were appropriate.

23] I am of the view that the benefit of the doubt should be given to the Accused where the learned trial judge misdirected himself with irrelevant considerations.

24] Thus, I acquitted and discharged the Accused Appellant charge under Section 403 of the Penal Code.

Appeal allowed. No costs.

JUDGE OF THE COURT OF APPEAL

AMAL RANARAJA J.

I agree

JUDGE OF THE COURT OF APPEAL